87-1725

NO._____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

JAMES A. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

GEORGE CORDOVA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A STATE TRIAL COURT IS REQUIRED TO INSTRUCT THE JURY ON A LESSER INCLUDED OFFENSE IN A CAPITAL CASE WHERE THERE IS NO AFFIRMATIVE EVIDENCE THAT THE DEFENDANT IS GUILTY ONLY OF THE NON-CAPITAL OFFENSE.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Now comes James A. Lynaugh, Director, Texas Department of Corrections, Petitioner herein,[1] and files this petition for writ of certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit reversing the district

[1] For clarity, Petitioner is referred to herein as "the state" and Respondent as "Cordova."

court and remanding with instructions to grant the writ of habeas corpus is published at 838 F.2d 764 (5th Cir. 1988), and is reproduced and attached hereto as Appendix A. The opinion of the United States District Court for the Western District of Texas, San Antonio Division, denying habeas corpus relief is not published, and is attached hereto as Appendix B. The opinion of the Texas Court of Criminal Appeals affirming Cordova's conviction and sentence is published at 698 S.W.2d 107 (Tex.Crim.App. 1985).

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1988. This petition for writ of certiorari is filed within ninety days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states, in pertinent part, as follows:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The state has lawful and valid custody of Cordova pursuant to a judgment and sentence of the 227th Judicial District Court of Bexar County, Texas. Cordova was indicted in Bexar County on April 23, 1980, for the offense of capital murder of Jose M. Hernandez while in the course of committing or attempting to commit the offense of robbery. Upon his plea of not guilty, Cordova was convicted by a jury on February 17, 1982, of the charged offense. After a separate hearing on punishment, the jury affirmatively answered the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987) on February 23, 1982. Accordingly, a death sentence was assessed. Cordova's conviction and sentence were affirmed by the Texas Court of Criminal Appeals on September 25, 1985, with rehearing denied on October 30, 1985. *Cordova v. State*, 698 S.W.2d 107 (Tex.Crim.App. 1985). A petition for writ of certiorari was denied by this Court on May 5, 1986. *Cordova v. Texas*, ___ U.S. ___, 106 S.Ct. 1942 (1986).

Cordova subsequently filed an application for state writ of habeas corpus, *see* Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon Supp. 1988), which was denied by the Court of Criminal Appeals. *Ex parte Cordova*, No. 16,148-01 (Tex.Crim.App. July 16, 1986). Cordova then filed a petition for writ of habeas corpus in the United States District Court for the Western District of Texas, San Antonio Division. On May 21, 1987, the district court denied the writ of habeas corpus. *Cordova v. Lynaugh*, No. SA-87-CA-0087 (W.D.Tex.-San Antonio, May 21, 1987). However, on June 19, 1987, the district court granted a certificate of probable cause to appeal. On February 17, 1988, the United

States Court of Appeals for the Fifth Circuit reversed the judgment of the district court and remanded with instructions to grant the writ of habeas corpus, conditioned upon the state's right to retry Cordova. *Cordova v. Lynaugh*, 838 F.2d 764 (5th Cir. 1988). On March 8, 1988, the court below, upon timely motion by the state, stayed the issuance of its mandate.

B. Statement of the Facts

Cynthia West was picked up for a date by the deceased at 8:10 p.m on August 3, 1979. After driving to various places throughout San Antonio, they finally parked in a well lighted area of a city park at 2:40 a.m. on August 4, 1979 (R IX 2659-70).[2]

Between five and twenty minutes after they arrived in the park, Cordova knocked on their car window and requested oil from the deceased, which was denied (R IX 2671-73). Cordova then drove away, only to return a few minutes later with Manuel Villanueva and two other accomplices. All four began knocking on the windows of the deceased's car. Cordova was armed with a tire iron and Villanueva with a knife. Cordova stated that they had run out of gas and requested a ride to get some gas, which was denied by the deceased (R IX 2673-76). As the deceased attempted to leave, Cordova, armed with his tire iron, and Villanueva, armed with his knife, attacked the deceased, who offered no resistance (R IX 2680-83). As the deceased remained bleeding and motionless in the vehicle, Cordova, still armed with the tire iron, forced West to run to another area of the park, threatening her as she ran. West and Cordova

[2]"R" refers to the appellate record in Cordova's direct appeal to the Texas Court of Criminal Appeals, with reference to volume and page number. This record was filed as an exhibit in the district court and the court of appeals below.

were followed by Villanueva and one of the other accomplices (R IX 2684-86, 2787). Cordova then robbed West of her watch and necklace and raped her (R IX 2687, 2689). After raping West, Cordova walked toward the two parked cars,[3] leaving Villanueva and the third male to rape West. Cordova later returned, and the three men then left in the two cars (R IX 2698, 2748).

West then returned to the parking lot where she had last seen the deceased. The deceased was lying face down in a pool of blood and his car, containing a citizen's band radio, a cassette tape deck and tapes, was gone (R IX 2790-91). The cause of the deceased's death was later established to be multiple stab wounds, with the primary wound being one to the neck which severed the spinal cord (R X 2909). An autopsy further revealed that the blows from Cordova's tire iron were not the cause of death, although they may have rendered the deceased unconscious or flexed his neck such that the fatal wound to the neck could have been administered (R X 29-14).

Villanueva returned home between 3:30 and 4:00 a.m. on August 4, 1979, wearing a bloody shirt and possessing the deceased's watch, cassette tapes and wallet, as well as Cynthia West's watch (R IX 2580-83, 2601-02, 2695). The deceased's automobile was recovered two days later approximately midway between Villanueva's and Cordova's residences. The deceased's citizens band radio and tape deck and Cynthia West's necklace were never recovered.

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[3]While West was being forced to run through the bushes, she observed the second car, which she thought might have been the deceased's, park beside the first car (R IX 2686).

After the state rested, Cordova offered a defense of misidentification, through the testimony of a San Antonio police officer who had detained four other Hispanic males, who matched West's description of her attackers, driving a vehicle matching her description of her assailants' vehicle, one day after the murder (R X 2937-42); a booking photograph, taken two days after the murder, depicting Cordova with shorter hair than the description given by West (R X 2945-52); the testimony of a sister and a friend that Cordova never dressed in the manner described by West (R X 2955-61, 2964-67); and the testimony of a videotaping expert that the lighting in areas of the park where the murder occurred was poor (R X 2973-86).[4] He further presented evidence of alibi, in the form of testimony by his sister that he was babysitting for her at the time of the crime (R X 2953-54, 2957-58).

SUMMARY OF ARGUMENT

There are special and important reasons to grant the writ. The judgment of the court of appeals below represents an unwarranted extension of this Court's holding in *Beck v. Alabama*, 447 U.S. 625 (1980). The question whether Cordova and his accomplices agreed to rob the deceased, which the court concluded was necessary to establish his guilt as a party, was only established by circumstantial evidence. Therefore, the court below concluded that because a jury could have found from the circumstantial evidence either that

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[4]During cross-examination of Cynthia West, Cordova further elicited the fact that, in addition to selecting Cordova and Villanueva as the two persons attacking the deceased, West had selected a third person during a pretrial lineup. West later explained, however, that this third person was not involved in the crime, and her selection of him was the result of a misunderstanding of a police detective's explanation of the procedures to be followed (R IX 2716-51).

Cordova intended to rob the deceased or that he "arguably" intended only to rape the deceased's girlfriend, he was entitled to a jury instruction on a lesser-included offense of murder. In so holding, the court below effectively creates a rule which requires an instruction on a lesser-included offense in every capital case because a jury is free to believe or disbelieve any evidence produced by the state, thus "arguably" raising a doubt as to any element of the capital offense. *Beck* and this Court's holdings in *Hopper v. Evans*, 456 U.S. 605 (1982), and *Spaziano v. Florida,* 468 U.S. 447 (1984), do not permit such a result.

The Texas standard governing the giving of a lesser-included instruction, applied by the trial court and the Court of Criminal Appeals in Cordova's case, is whether there is some evidence in the record that, if the defendant is guilty, he is guilty of only the lesser offense. This standard is, as the court below implies, indistinguishable from the federal standard and clearly meets due process requirements. In this case, the state sought to establish Cordova's guilt as a party, and therefore had to prove that he acted with the intent to promote or assist the commission of a robbery of the deceased. Neither Cordova nor the state presented direct evidence of Cordova's intent, and Cordova's evidence offered in his defense focused exclusively on the issue of identity. That Cordova's accomplices intended to rob the deceased is unquestioned. No rational juror could conclude that Cordova and his accomplices did not agree to attack the deceased for that purpose. Thus, even if Cordova did not intend to rob the deceased, but only intended to assist his accomplices in that endeavor to enable him to rape the deceased's girlfriend, he is nonetheless criminally liable for the robbery, and, thus, capital murder under the Texas rule of parties. *See* Tex. Penal Code Ann. § 7.01 *et seq.* (Vernon 1974). No rational jury could have

entertained a doubt as to any element of capital murder, and therefore Cordova was not entitled to a lesser-included instruction.

The trial court, having heard the evidence and viewed the witnesses, properly concluded that, given the totality of the evidence of Cordova's actions before, during and after his attack on the deceased, there was no basis for a reasonable inference that Cordova did not, with the intent to promote or assist, encourage his accomplices, either by words or other agreement, to rob the deceased at or before the attack. The court of appeals below, without the trial court's unique perspective, simply substituted its judgment, after reading a cold record, for that of the trial court, and compounded its error by misapplying the Texas law of parties. As this Court has frequently counseled, however, a federal habeas court should not so act, and must defer to state court interpretations of state law and accord trial court findings a presumption of correctness under 28 U.S.C. § 2254(d). The court of appeals below failed to accord even a modicum of deference to the findings of the state courts in this case. The trial court's findings find ample support in the record, and therefore the judgment of the court below must be reversed.

REASONS FOR GRANTING THE WRIT

THE OPINION BY THE COURT OF APPEALS BELOW REPRESENTS AN UNWARRANTED EXTENSION OF THIS COURT'S HOLDING IN *BECK V. ALABAMA* AND FAILS TO ACCORD PROPER DEFERENCE TO THE STATE COURTS' FINDINGS, AS REQUIRED BY 28 U.S.C. #2254(d).

A. The court of appeals' opinion, if allowed to stand, effectively eliminates the requirement that lesser-included instructions need be given only where a rational fact finder would convict of the lesser offense and acquit of the greater.

In *Beck v. Alabama*, 447 U.S. 625 (1980), the Court invalidated a state statute which prohibited a trial judge in a capital murder trial from instructing a jury on a lesser included offense of felony murder, even though there existed evidence of such a lesser crime. In so acting, the Court held that where the unavailability of a lesser included instruction in a capital case enhances the risk of an unwarranted conviction, the state is constitutionally precluded by the Due Process Clause of the Fourteenth Amendment from withholding that option from the jury. 447 U.S. at 637-38. *See also Spaziano v. Florida*, 468 U.S. 447, 454-57 (1984). In a subsequent capital murder case, the Court fully explained its holding in *Beck*:

> In *Roberts v. Louisiana,* [428 U.S. 325, 96 S.Ct. 3001 (1976)] the Court considered a Louisiana statute which was the obverse of the Alabama preclusion clause [at issue in Beck]. In Louisiana, prior to *Roberts*, every jury in a capital murder case was permitted to return a verdict of guilty of the noncapital crimes of second-degree murder and manslaughter, "even if there [was] not a scintilla of evidence to support the lesser verdicts." *Id.*, 428 U.S. at 334, 96 S.Ct. at 3006 (plurality opinion). Such a practice was impermissible, a plurality of the Court concluded, because it invited the jurors to disregard their oaths and convict a defendant of a lesser offense

> when the evidence warranted a conviction of first-degree murder, inevitably leading to arbitrary results. *Id.* at 335, 96 S.Ct. at 3007. The analysis in *Roberts* thus suggests that an instruction on a lesser offense in this case would have been impermissible absent evidence supporting a conviction of a lesser offense.
>
> *Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence. Under Alabama law, the rule in noncapital cases is that a lesser included offense instruction should be given if "there is any reasonable theory from the evidence which would support the position." *Fulghum v. State*, 291 Ala. 71, 75, 277 So.2d 886, 890 (1973). The federal rule is that a lesser included offense instruction should be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973). The Alabama rule clearly does not offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases.

Hopper v. Evans, 456 U.S. 605, 611-12 (1982) (original emphasis).

The Texas rule regarding lesser included instruction is set forth in *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex.Crim.App. 1985), and *Lugo v. State*, 667 S.W.2d 144, 147-49 (Tex.Crim.App. 1984). First, the lesser included offense must be included within the proof necessary to establish the greater offense charged. Second, there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense. Moreover, the evidence necessary to require such an instruction need not arise only from a defendant's testimony; it may arise from the state's evidence or from defense evidence other than the defendant's testimony. *Lugo v. State,* 667 S.W.2d at 147-49. As the court below implies, *see Cordova v. Lynaugh,* 838 F.2d at 767 n.3, the state standard is virtually indistinguishable from the federal standard governing lesser included instructions. *See Keeble v. United States*, 412 U.S. 205, 208 (1973). Thus, the state standard clearly meets due process requirements, as set forth in *Beck* and *Hopper*.

In this case, because the fatal wound was inflicted by Villanueva, the state sought to convict Cordova under the Texas law of parties, which provides in pertinent part:

> A person is criminally responsible for an offense committed by the conduct of another if:
>
> * * * *
>
> (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense;

Tex. Penal Code §7.02(a)(2) (Vernon 1974). Interpreting these state law provisions, the court of appeals below concluded that an instruction on the lesser-included offense of murder was constitutionally

required because evidence of Cordova's and Villanueva's prior agreement or common purpose to rob the deceased was established by circumstantial evidence. The court below found that the jury could have rejected the inference of such a prior agreement because there was no evidence of Cordova's personal participation in the robbery of the deceased or Cordova's personal intent to rob the deceased, and none of the deceased's property was traced to him,[5] and that the jury instead could "arguably" have concluded that Cordova only intended to rape the deceased's girlfriend. Cordova v. Lynaugh, 838 F.2d at 769-70.

By focusing on these two pieces of evidence, to the exclusion of numerous other facts, the court below effectively eliminated the rationality requirement set forth in *Hopper* and *Keeble*. A jury is equally free to reject any evidence, direct or circumstantial, presented in a criminal case. Thus, under the rationale of the court below, a jury could reject a defendant's confession reflecting his intent, and, because only circumstantial evidence remained to establish his intent, he would be entitled to a lesser-included instruction if it "arguably" could infer a lesser culpable mental state from the circumstantial evidence. *Beck* and *Hopper* require that a lesser-included instruction be given only if a fact finder could *rationally* convict of the lesser offense and acquit of the greater. The court of appeals' opinion thus represents an unwarranted and improvident extension of the rule in *Beck*.

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[5]Cordova was arrested on a San Antonio street near his father's house on August 6, 1979, over two days after his commission of capital murder. No items belonging to the deceased or West were recovered from Cordova at the time of his arrest. The record does not reflect whether a search of Cordova's home was conducted.

In this case, the evidence established that Cordova assumed an active leadership role during the events leading to the murder and robbery of the deceased and the rape and robbery of Cynthia West. The four assailants arrived in the park in one vehicle and left in two vehicles, the second of which Cynthia West believed to be the deceased's. After first approaching the deceased with a pretextual request for oil, Cordova returned to his accomplices. After a period of time, Cordova and his accomplices returned and made another request of the deceased, this time for gasoline. After participating in the killing of the deceased, Cordova and two accomplices forced Cynthia West to another area of the park, where she was raped, and a third accomplice drove the deceased's vehicle to the area where the rape occurred and parked next to the vehicle in which Cordova and his accomplices arrived in the park. Cordova robbed West prior to raping her.[6] Some of the proceeds of Cordova's robbery of West were subsequently discovered in Villanueva's possession. Some of the proceeds of the robbery of the deceased were discovered in Villanueva's possession. There is no evidence that Cordova, upon encountering his accomplices in possession of the deceased's property, disavowed any understanding that the deceased was to be robbed.

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[6]The court of appeals below, in rejecting the state's argument that Cordova's robbery of West demonstrated his larcenous intent, concluded that it did not "conclusively" establish that he had the same intent to rob the deceased. Moreover, the court noted that Cordova was not that interested in robbery because Cordova took her wristwatch and necklace, but decided against taking her high school ring. Therefore, the court concluded that Cordova was primarily interested in raping West and arguably intended throughout the attack only to rape West, not to rob the deceased. Cordova v. Lynaugh, 838 F.2d at 769-70. The logic behind the court below's conclusion that the leaving of a high school ring defeats the inference of larcenous intent escapes the state.

Contrary to the opinion of the court below, no rational fact finder could have concluded that Cordova did not agree to assist Villanueva and his other two accomplices in robbing the deceased. Cordova clearly returned to his accomplices after first reconnoitering the deceased's vehicle for the purpose of formulating a plan of attack. In obvious furtherance of the plan, the deceased's vehicle was taken to the area where Cordova and his accomplices had parked their car and where Cordova and two accomplices were raping West. Even if a jury could rationally conclude that Cordova did not intend to rob the deceased but only intended to rape West, such a specific intent on Cordova's part was not required under the Texas law of parties, as long as by words or other agreement, and with the intent to promote or assist in the commission of the crime, he aided his accomplices in their commission of the robbery. *See Sanders v. State,* 640 S.W.2d 640 (Tex.App.--Houston 1982); *Cross v. State*, 550 S.W.2d 61 (Tex. Crim.App. 1977); *Raven v. State*, 533 S.W.2d 773 (Tex.Crim.App. 1976). Throughout its opinion, the court of appeals below demonstrates a fundamental misapprehension of the Texas law of parties. The court below appears to require Cordova to possess an actual intent to rob the deceased at the time of the attack in order to hold him liable for capital murder as a party. However, the only requirement to hold a person liable as a party is encouragement of the commission of the robbery accompanied by an intent to assist in the commission of the offense. If Cordova encouraged and assisted in the commission of the robbery while desiring to rape the deceased's girlfriend, he is nonetheless liable as a party for the robbery.

Further, the string of circumstantial evidence clearly demonstrates that Cordova did possess larcenous intent, and the only rational inference to be drawn from the facts proven at trial is that Cordova

planned to rob the occupants of the deceased's vehicle and share the proceeds recovered.[7] Cordova's conduct prior to, during and after the attack clearly established his liability as a party and his intent to kill the victim, and no juror could reasonably have concluded otherwise. In sum, there simply is no evidence showing that Cordova is guilty only of the lesser-included offense of murder. Because no element of the offense of capital murder remained in doubt, the refusal of the trial court to instruct the jury on the offense of murder did not lessen the certainty or reliability of the factfinding process.[8] Therefore, the judgment of the court of appeals below must be reversed.

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[7]The court of appeals below, in focusing on limited circumstances rather than looking at all of the evidence, absolutely ignores the facts that a portion of the proceeds from Cordova's robbery was found in Villanueva's possession and only a portion of the deceased's property was in Villanueva's possession and that there was no evidence that Cordova disavowed any such intent when he and his companions left the scene with the deceased's property. It simply is not reasonable to conclude that a person who robbed a woman would, within two hours, give the proceeds of the robbery to an accomplice without expecting and receiving something in return.

[8]This Court in *Beck, Hopper* and *Spaziano* recognized a limited constitutional right to a lesser included instruction in capital cases to promote rational decisionmaking in such cases. Thus, where a defendant has undoubtedly committed a serious crime, but the jury may have some doubt about an element of the crime that causes it to be a capital case, the defendant must be afforded the right to have the jury consider whether he committed a serious, but noncapital, crime. Here, the only "arguable" doubt set forth by the court below is whether Cordova committed murder during the course of committing robbery or rape, which are both capital offenses. Tex.Penal Code Ann. §19.03(a)(2) (Vernon Supp. 1988). To have allowed a jury to convict Cordova of simple murder, which the evidence did not support, would not promote the rationality contemplated by *Beck* and its progeny.

B. The court of appeals' failure to defer to the state courts' interpretation of state law and to accord a presumption of correctness to the trial court's factual determination that no rational juror could convict Cordova of a lesser-included offense and acquit of capital murder mandates reversal.

In this case, the court of appeals below interpreted the state law of parties in a manner wholly inconsistent with the state courts' interpretation of their law. Moreover, the court of appeals below determined as a factual matter that evidence existed which would have allowed a jury to rationally convict Cordova of a lesser offense of murder and acquit him of the greater offense of capital murder, despite the fact that the state courts had made the opposite factual determination. The court of appeals' failure to accord any deference to the state court determinations of law and fact ignores the limited nature of a federal habeas court's inquiry into the validity of a state conviction and mandates reversal.

In finding that there existed evidence upon which a jury could have convicted Cordova of a lesser offense and acquitted him of capital murder, the court below substituted its interpretation of the Texas law of parties for that of the Texas courts. In so doing, it ignored the well established rule that a state's highest court is the ultimate expositor of a state's law, and the federal courts are bound to accept the interpretation of state law by the state court. *Hortonville Joint School District v. Hortonville Education Association,* 426 U.S. 482 (1976); cf. *Moore v. Duckworth*, 443 U.S. 713 (1979) (proper deference to state law governing proof of sanity in habeas corpus action); *Jurek v. Texas*, 428

U.S. 262 (1976) (power to construe state death penalty statute reserved to the state courts).

Here, the court of appeals interpreted the Texas law of parties to require that Cordova possess an intent to rob the deceased before he could be held liable as a party. This interpretation is clearly contrary to state law, which only requires an intent to promote or assist another in the commission of a crime. *Cross v. State*, 550 S.W.2d at 63; Tex. Penal Code §7.02(a)(2). The failure of the federal court of appeals, in considering this habeas corpus action, to defer to the Texas appellate courts' interpretation of state law compels reversal of its judgment.

In addition, the trial court's and Court of Criminal Appeals' determination that the evidence was such that a rational juror could not have found Cordova guilty only of the lesser offense of murder is clearly factual in nature. *Wainwright v. Witt*, 469 U.S. 412 (1985) (juror bias); *Patton v. Yount*, 467 U.S. 1025 (1984) (same); *Maggio v. Fulford*, 462 U.S. 112 (1983) (existence of *bona fide* doubt as to competency). Here, the trial court applied the correct constitutional standard in determining whether a lesser-included instruction should be given, *see* pages 9-11, *supra*, and must be presumed to have correctly applied the Texas law of parties in making its determination. *See Wainwright v. Witt*, 469 U.S. at 431. The trial judge's factual determination, undoubtedly aided by his hearing of the evidence and his viewing the witnesses' demeanor, is fully supported in the record. *See* pages 13-15, *supra*. Therefore, the state court's findings were entitled to a presumption of correctness under 28 U.S.C. §2254(d). The failure of the court of appeals to accord such a presumption mandates reversal of its judgment by this Court.

CONCLUSION

For these reasons, the state respectfully prays that the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

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APPENDIX A

George Cordova,
Petitioner-Appellant,

v.

James A. LYNAUGH, Director, Texas Department of Corrections,
Respondent-Appellee.

No. 87-5547.

United States Court of Appeals,
Fifth Circuit.

Feb. 17, 1988.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, GARWOOD and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:

George Cordova, sentenced to death by a Texas court for the murder-robbery of Joey Hernandez, appeals the denial of the writ of habeas corpus. Our examination of the record reveals that the state trial court violated Cordova's due process rights by failing to instruct on the lesser included offense of murder. We reverse and remand with directions to conditionally grant the writ.

I.

Jose (Joey) Hernandez and Cynthia West in the early morning hours of August 4, 1979 "parked" in a small parking lot in Espada Park in San Antonio, Texas. As Hernandez and West talked in the car, George Cordova approached and asked for oil. Hernandez replied that he did not have any and Cordova left. At around 2 a.m., Cordova returned with Manuel Villanueva and two other men.

When Hernandez reached to start the car, he was struck in the face by one of the men. The car door was opened and Cordova and Villanueva started beating Hernandez. West saw Cordova strike Hernandez with a tire iron and Villanueva attack him with a knife. Cordova took West's wrist and forced her to run into a wooded area of the park. Along the way, Cordova threatened to do to her what he did to Hernandez. West was then forced to the ground faced down and Cordova stuck the tire iron next to her face and again threatened her. Cordova made West stand up and run further into the woods, where he undressed her, taking her watch and a necklace. She was raped by Cordova, Villanueva, and a third man. After the attackers departed, West dressed and ran back to the parking lot. There, she discovered that the car was gone and Hernandez was lying dead in a pool of blood.

When Villanueva was arrested shortly after the crime, he had a bloodied knife in his possession. Leon Springs testified that Villanueva returned home on August 4 with a bloody shirt. Springs turned over to police some 8-track tapes which belonged to Hernandez, together with Hernandez's watch and empty wallet. Springs testified that Villanueva had given him the property. Two cassette boxes, identified as belonging to Hernandez, were recovered from

Villanueva's sister who had received them from Villanueva. West's watch was also recovered from Villanueva's house. Hernandez's car was discovered on a street about 2 1/2 blocks from Villanueva's house, and approximately the same distance from the house where Cordova lived.

Cordova was indicted for capital murder. Specifically, he was charged with intentionally causing the death of Hernandez by stabbing him with a knife while in the course of committing and attempting to commit a robbery of Hernandez. Tex.Penal Code Ann. §19.03(a)(2) (Vernon 1974).

The testimony at trial consisted mainly of West's account, as related above, of the events of August 4. She positively identified Cordova and Villanueva. Other testimony established where the car and other property was found. Besides West's identification, the only other evidence connecting Cordova to the criminal activity was Leon Spring's testimony that he was at the Villanueva house on the evening of August 3 when he saw Cordova come and pick up Villanueva and Villanueva's sister's testimony that she saw Cordova with Villanueva on August 6. There was no physical evidence linking Cordova to the crime and no stolen property was found on Cordova or in his house.

The medical evidence introduced showed that Hernandez had wounds on his face that could have been caused by a tire iron. However, the cause of death was a stab wound to the back of the neck.

After the close of the evidence, Cordova's counsel objected to the failure to include an instruction on the lesser included offense of murder. The trial court overruled the objection.

The jury found Cordova guilty of capital murder. After presentation of evidence at the punishment stage, the jury answered "yes" to both special issues submitted to it. *See* Tex.Crim.Proc.Code Ann. art. 37.0071(b) (Vernon 1981 & Supp.1987). Cordova was then sentenced to death. Tex.Crim.Proc. Code Ann. art. 37.071(c)-(e).

The Texas Court of Criminal Appeals affirmed Cordova's conviction and sentence. *Cordova v. State,* 698 S.W.2d 197, 110-11 (Tex.Crim.App.1985), *cert. denied,* 476 U.S. 1101, 106 S.Ct. 1942, 90 L.Ed.2d 352 (1986). In addressing Cordova's claim that the trial court erred in refusing to instruct on the lesser included offense, the court stated:

> In determining whether a defendant is entitled to a charge on a lesser included offense we will consider all the evidence presented at trial. [In doing so], this Court [applies a] two-prong test.... The first prong requires that the lesser included offense must be included within the proof necessary to establish the offense charged. Secondly, there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense.
>
> The defendant did not testify nor did he offer any testimony which might reasonably raise any lesser included offenses. The fact that the State in proving capital murder may also have proved a lesser offense does not entitle a defendant to a charge on the lesser offense. There is no evidence in the record that the appellant was guilty of only a lesser included offense.

Id. at 113 (citations omitted).

After exhausting his state court remedies, Cordova brought a habeas action raising a number of issues. The district court denied relief and Cordova appeals. We need only address the issue of failure to instruct on the lesser included offense of murder.[1]

II.

A.

In *Beck v. Alabama,* 447 U.S. 625, 638, 100 S.Ct. 2382, 2390, 65 L.Ed.2d 392 (1980), the Supreme Court invalidated, on due process grounds, a provision of the Alabama death penalty statute that precluded the jury from being instructed on a lesser included noncapital offense. As explained in *Hopper v. Evans,* 456 U.S. 605, 610, 102 S.Ct. 2049, 2052, 72 L.Ed.2d 367 (1982), *Beck* stands for the proposition that "the jury [in a capital case] must e permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the evidence would have supported such a verdict.'" Although *Beck,* strictly speaking, "holds only that a state cannot impose a blanket ban on the giving of lesser-included-offense instructions in a capital case." *Reddix v. Thigpen*, 805 F.2d 506, 511 (5th Cir.1986), we have consistently held that *Beck's* holding applies when the

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[1]Our order of retrial moots all of Cordova's other claims except for his claim that the evidence was insufficient to show that the murder was during the course of robbery. A finding of insufficiency of the evidence would implicate double jeopardy concerns. *See, e.g., United States v. Sneed,* 705 F.2d 745, 747-49 (5th Cir.1983). However, as our discussion on the lesser included offense makes clear, see infra § II(C), the evidence was sufficient to prove that the murder was in the course of a robbery of Hernandez.

state trial court refuses a lesser included offense instruction. *See Reddix,* 805 F.2d at 511-12 (applying *Beck* but finding no violation because evidence did not support lesser included offense); *Bell v. Watkins,* 692 F.2d 999, 1004-05 (5th Cir.1982), *cert. denied,* 464 U.S. 843, 104 S.Ct. 142, 78 L.Ed.2d 134 (1983) (same).[2]

[1] The federal standard "is that a lesser included offense instruction should be given 'if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater.'" *Hooper,* 456 U.S. at 612, 102 S.Ct. at 2053 (quoting *Keeble v. United States,* 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973)). As the Supreme Court noted, the states have varied "in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included instruction...." *Beck,* 447 U.S. at 636 n. 12, 100 S.Ct. at 2389 n. 12. Without denigrating any state's standard, including Texas',[3] we

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[2]A plain reading of *Beck* and *Hopper* inexorably leads to the same conclusion. If due process is violated because a jury cannot consider a lesser included offense that the "evidence would have supported," *Beck,* 447 U.S. at 627, 100 S.Ct. at 2384, the source of that refusal, whether by operation of state law or refusal by the state trial court judge, is immaterial.

[3]As explained in *Cordova,* 698 S.W.2d at 113, Texas courts apply a two prong test for lesser included offenses. The first prong, "that the lesser included offense must be included within the proof necessary to establish the offense charged," is, apparently, nothing more than a requirement that the lesser included offense really be a lesser included offense. The second prong that "there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense," seems very similar to the federal standard.

However, we are not concerned about the Texas standard or its possible misapplication to the facts here. Instead, we only address the issue of whether due process required that Cordova's jury be given a lesser included instruction.

conclude that the federal standard-a lesser included instruction must be given when a jury could rationally convict of the lesser offense and acquit on the greater offense-is equivalent to the *Beck* standard that a lesser included instruction must be given when the evidence would have supported such a verdict. In other words, due process and the Eighth Amendment require that, in a capital case, the jury must be allowed to consider a lesser included noncapital offense if the jury could rationally acquit on the capital crime and convict for the noncapital crime. *See Beck,* 447 U.S. at 635-37, 100 S.Ct. at 2388-89; *Hopper,* 456 U.S. at 611-12; 102 S.Ct. at 2053. Similarly, our cases have also used the federal standard in the *Beck* situation. *Bell,* 692 F.2d at 1004-05; *Reddix,* 805 F.2d at 512. *Beck* rested on the proposition that when "the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." 447 U.S. at 637, 100 S.Ct. at 2389. The federal standard, by looking at what a rational juror could do, given the evidence, directly addresses that risk. Finally, the attorney for Texas conceded at oral argument that the federal standard was proper in the *Beck* situation.

The issue here is whether a rational juror, given all the facts, could have acquitted Cordova of capital murder and convicted him of a lesser included offense. An understanding of the laws of Texas is unnecessary to answer that issue.

B.

Cordova was indicted for, and convicted of, capital murder. Specifically, the indictment charged

that Cordova murdered Hernandez during the course of robbery of Hernandez. The capital murder statute in Texas, Penal Code Ann. §19.03 (Vernon 1974) provides, in pertinent part:

> (a) a person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:
>
> . . . .
>
> (2) the person intentionally commits the murder in the course of committing or attempting to commit ... robbery....[4]

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[4]The statute, at the time of Cordova's crime, read in full:

(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

> (1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;
>
> (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;
>
> (3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
>
> (4) the person commits the murder while escaping or attempting to escape from a penal institution; or
>
> (5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

(b) An offense under this section is a capital felony.

(footnote continued on next page)

Section 19.02(a)(1) of the Texas Penal Code, defines murder: "A person commits an offense if he: (1) intentionally or knowingly causes the death of an individual."

That the murder must have been committed "in the course of committing ... robbery," §19.03(a)(2), means that the conduct causing the death occurred "in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of [the] ... robbery," *Fierro v. State,* 706 S.W.2d 310, 313 (Tex.Crim.App. 1986) (quoting *Riles v. State,* 595 S.W.2d 858, 862 (Tex.Crim.App.1980)). If a robbery is committed as an "afterthought" and unrelated to the murder, it is simple murder and not capital murder. *O'Pry v. State,* 642 S.W.2d 748, 762 (Tex.Crim.App.

(footnote continued from previous page)
(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Tex. Penal code Ann § 19.03 (Vernon 1974).

The statute was later amended to change "aggravated rape" to "aggravated sexual assault" in subsection (a)(2) and to add to section (a):

> (6) the person murders more than one person:
>
> (A) during the same criminal transaction; or
>
> (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.

Tex.Penal Code Ann.§ 19.03 (Vernon Supp. 1988).

We note that the indictment did not charge Cordova with the murder of Hernandez during the course of aggravated rape or robbery of West. Instead, the only allegation that made the murder capital was the robbery of Hernandez.

1982). In other words, as charged by the indictment, the state had to prove that Cordova intentionally[5] caused the death of Hernandez, in an attempt to commit, during the commission of, or in immediate flight after the attempt or commission of robbery of Hernandez.

The law of parties applies to the guilt phase of a capital murder trial. *Cordova,* 698 S.W.2d at 111; *English v. State,* 592 S.W.2d 949, 955 (Tex.Crim.App.), *cert. denied,* 449 U.S. 891, 101 S.Ct. 254, 66 L.Ed.2d 120 (1980); *see* Tex.Penal Code Ann. §§ 7.01, 7.02 (Vernon 1974) (law of parties). The Texas Court of Criminal Appeals explained the law of parties in *Cordova,* 698 S.W.2d at 111 (citation omitted):

> Evidence is sufficient to convict the defendant under the law of parties where he is physically present at the commission of the offense, and encourages the commission of the offense either by words or other agreement. The agreement, if any, must be before or contemporaneous with the criminal event. To convict someone as a party to an offense, the evidence must show that at the time of the offense the parties were acting together, each doing some part of the execution of the common purpose. In determining

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[5]Although murder is defined in Tex.Penal Code Ann. § 19.02(a)(1) as "knowingly or intentionally" causing the death, § 19.03(a)(2) specifies that the murder must be intentional in these circumstances. Intentional is the requisite mental state; murder committed knowingly during the course of robbery is not capital murder under § 19.03(a)(2). *Demouchette v. State,* 731 S.W.2d 75, 80 (Tex.Crim.App.1986), *cert. denied,* ___ U.S. ___, 107 S.Ct. 3197, 96 L.Ed.2d 685 (1987).

> whether the accused participated as a party, the court may look to events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act.

As the Court of Criminal Appeals has stressed, the agreement must be prior to the act. *See Randolph v. State,* 656 S.W.2d 475, 477 (Tex.Crim.App.1983) (Subsequent agreement to fabricate a story with no evidence of prior agreement was insufficient for murder conviction).

Finally, we conclude with relevant Texas law by noting that murder is a lesser included offense of capital murder. *See* Tex. Penal Code Ann. § 19.03(c) (If the jury does not find the defendant guilty of capital murder, it may convict him "of murder or any other lesser included offense.").

C.

[2] In order to prove capital murder, the state had to show that Cordova intentionally murdered Hernandez, either personally or as a party. The specific issue is whether a rationally jury could have found that Cordova murdered Hernandez but that it was not in the course of the robbery. If so, the trial court violated due process by not instructing on the lesser included offense of murder.

A brief review of the evidence shows that Cordova and Villanueva approached and attacked Hernandez. Cordova then took West off into the woods where he raped her. Cordova went off while two other men raped West. He then returned and everybody left.

West's own testimony proved that Cordova participated in her rape and the murder of Hernandez. The proof of Cordovca's participation in the robber of Hernandez is only circumstantial and far from certain. Hernandez was definitely robbed: his car was found abandoned and his watch and wallet and other items were given to police by people who said Villanueva gave the items to them. But the sequence of events tends to show that Cordova did not personally commit the robbery of Hernandez. Cordova was with West most of the time. West testified that when he left her, Cordova went in the direction of the cars on the dirt road. She did not testify that he went in the direction of the parking lot where Hernandez lay.

The state contends that Cordova is guilty as a party. They point to him as a leader of the gang, since he did the talking, and the fact that he robbed West. The state concludes that this shows he had a prior agreement to rob Hernandez. We agree that the jury could infer that Cordova had a prior agreement to rob Hernandez.[6] The problem is that the jury could reject that inference. Given the lack of evidence of Cordova's personal participation in the robbery, as well as the fact that none of the stolen items were traced to Cordova,[7] a rational jury could conclude that Cordova did not have a prior agreement to rob Hernandez.

The state points to the fact that Cordova robbed West to show his larcenous intent. The state also argues that the evidence is conclusive on the robbery because there is no other reason to attack Hernandez.

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[6]*See supra* n. 1.

[7]Hernandez's car was found equi-distant between Cordova's Villaneuva's houses in a heavily residential area. That evidence does not necessarily prove that Cordova stole it.

We disagree. The fact that Cordova robbed West simply does not establish conclusively that he had the same intent to rob Hernandez. Indeed, Cordova let West keep her high school ring, indicating that he was not all that interested in robbery. As for the purpose of the attack, Cordova seemed most interested in raping West. It is at least arguable that his purpose throughout was to rape West, not to rob Hernandez.

Given all of the evidence, especially Cordova's lack of personal participation in the robbery of Hernandez and the fact that no stolen property was traced to him, we conclude that a rational jury could have concluded that Cordova had no "prior agreement or common purpose," *Cordova,* 698 S.W.2s at 112, to rob Hernandez. It could then have acquitted Cordova of capital murder, and found him guilty of murder. Since the trial court refused to instruct on the lesser included offense of murder, and the "evidence would have supported such a verdict." Cordova's due process rights were violated. *Hopper,* 456 U.S. at 610, 102 S.Ct. at 2052.

To recapitulate, the evidence would support the jury in finding either that Cordova planned the robbery of Hernandez or that he did not so plan. The proof of Cordova's agreement to rob Hernandez, unlike the proof of his intent to kill Hernandez, was circumstantial and ambiguous. If properly instructed, therefore, the jury could have found Cordova guilty of either simple murder or capital murder. Without the instruction on the lesser included offense of murder, the choice given to the jury in this trial was between conviction for capital murder and acquittal. The pressure to avoid acquitting so reprehensible an actor, driving the jury toward conviction for (robbery) capital

murder, registers the due process and Eighth Amendment violations.[8]

III.

The judgment of the trial court denying the writ is reversed. We remand and instruct the trial court to grant the writ conditioned upon the retrial of Cordova by the State of Texas.

REVERSED and REMANDED.

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[8]We note that the type of constitutional error here can never be harmless. *See Hopper,* 456 U.S. at 610, 102 S.Ct. at 2052 (Jury in capital case "must be permitted to consider a verdict of guilt of a noncapital offense "in *every* case' in which 'the evidence would have supported such a verdict.'") (emphasis added). By the very nature of the error, that the jury could have rationally convicted of a less than capital offense but was not allowed to consider the offense by the jury instructions, precludes any harmless error analysis.

The nature of the initial inquiry itself is very similar to a harmless error analysis. If the instruction was refused, but the jury could not rationally convict on the lesser offense, then the alleged error would be harmless. In other words, the harm is subsumed in the test itself.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GEORGE CORDOVA,	)	
	)	
Petitioner,	)	
	)	
VS.	)	**CIVIL ACTION NO.**
	)	**SA-86-CA-1056**
	)	
0. L. McCOTTER, Director	)	
Texas Department of	)	
Corrections,	)	
	)	
Respondent.	)	

ORDER

I. INTRODUCTION

Petitioner George Cordova was found guilty of capital murder on February 10, 1982, in the District Court for the 227th Judicial District of Bexar County. On February 23, 1982, the jury answered the special issues affirmatively and a death sentence was imposed. Petitioner's conviction was affirmed on direct appeal by the Court of Criminal Appeals on September 25, 1985. *Cordova v. State*, 698 S.W. 2d 107 (Tex. Crim. App. 1985). The United States Supreme Court denied the applicant's petition for writ of certiorari on May 5, 1986. *Cordova v. Texas*, ___U.S. ___, 106 S.Ct. 1942 (1986).

After an execution date was set Petitioner filed an application for state writ of habeas corpus in the

convicting court. The trial court recommended that it be denied and the Texas Court of Criminal Appeals affirmed the denial of the writ application on July 16, 1986. Petitioner's execution was scheduled for July 21, 1986, but this court granted Cordova's application for stay of execution on July 18, 1986. Petitioner then brought this action for habeas corpus relief pursuant to 28 U.S.C. §2254. The matter now before the Court is the Findings and Recommendations of the United States Magistrate Dan A. Naranjo, filed October 17, 1986 (hereinafter "Magistrate's Findings"), and Petitioner's objections, filed November 7, 1986.

In reviewing the Magistrate's Findings, the district court must undertake a *de novo* review of all matters which are objected to. *See generally, Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982).

The facts in this case have been set forth in detail elsewhere. *See, Cordova v. State, supra*, at 110-112; Magistrate's Findings, at 1-6. This Court will only discuss the facts as necessary to review the Magistrate's Findings. Briefly summarized, the material undisputed facts surrounding the crime which took place on August 4, 1979 are as follows. In the early hours of August 4, 1979, Jose (Joey) Hernandez and Cynthia West were parked in Joey's car in Espada Park, a public park located in south San Antonio. Hernandez' vehicle was the only car present in the parking area when the two occupants were approached by four young men who asked them for a ride to a gas station. After this request was refused, the youths returned ten to fifteen minutes later. Two of them attacked and beat Joey Hernandez, who was later found dead from his injuries. Three of the young men pulled Cynthia West from the car and raped her in another isolated area of the park. Hernandez' car and several items of personal property were taken by the

assailants. George Cordova was identified by Cynthia West as one of the men who attacked Joey Hernandez and as one of the men who raped her.

II. PETITIONER'S OBJECTIONS

Petitioner raises six separate claims in his application which the Court will address in turn:[1]

A. Petitioner was denied a fair and impartial trial as provided by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Art. 1, §10, of the Texas Constitution on the grounds that there was insufficient evidence upon which to convict Petitioner of capital murder.

B. Petitioner was denied a fair and impartial trial as provided by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Art. 1, §10, of the Texas Constitution due to the trial court's failure to instruct the jury on the lesser included offense of murder.

C. Petitioner was denied a fair and impartial trial as provided by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution

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[1]In his original habeas petition referred to the Magistrate, Petitioner raised a seventh claim that testimony from his two brothers, Johnny and Ruben Cordova, shows that he was not at the crime scene. The Magistrate correctly determined that claims of the existence of newly discovered evidence relevant to the guilt of the Petitioner do not constitute grounds for relief in federal habeas corpus. *Townsend v. Sain*, 372 U.S. 293, 317 (1963); *De La Rosa v. Procunier*, No. 85-2331 (5th Cir. May 13, 1985); *Armstead v. Maggio*, 720 F.2d 894, 896 (5th Cir. 1983). Petitioner did not object to the Magistrate's determination and it is hereby adopted by the District Court.

and Art. 1, §10, of the Texas Constitution in that he was denied effective assistance of counsel.

D. Petitioner was denied a fair and impartial trial, effective assistance of counsel, equal protection of the law, due process of law, due course of law, and his right to be free of cruel and unusual punishment guaranteed by the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution and Article 1, §§10 and 19, Texas Constitution, because the court failed to define the term "deliberately" as that term is used in Tex. Code Crim. P. Ann. art. 37.071(b)(1).

E. Petitioner was denied a fair and impartial trial as provided by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Art. 1, §10, of the Texas Constitution in that the in-court identification of Petitioner was tainted by an illegal out-of-court identification obtained in violation of Petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution and Art. 1, §9, of the Texas Constitution.

F. Petitioner was denied a fair and impartial trial as provided by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Art. 1, §10, of the Texas Constitution in that the death penalty as applied to Petitioner constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Art. 1, §10, of the Texas Constitution.

III. DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE

Petitioner objects to several of the Magistrate's Findings[2], but his central and only serious allegation is

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[2]Petitioner raises numerous other objections to the Magistrate's factual findings, many of which are not material to the determination of Petitioner's six claims of error. Petitioner complains that the evidence did not show he knew that his associate Manuel Villanueva was armed with a knife. Cynthia West testified that Cordova jointly attacked Joey Hernandez with Manuel Villanueva (Trial Record Volume IX at 2682-83), so even if Petitioner was not aware that Villanueva was carrying a knife prior to the attack, he at least became aware of this fact during the attack. Furthermore, the state high court found that Cordova planned the attack and knew the weapons which would be used. *Cordova v. State*, 698 S.W. 2d at 112. This finding is entitled to "great weight" for purposes of this Court's review. *Parker v. Procunier*, 763 F.2d 665, 666 (5th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 159 (1985). Petitioner objects to Magistrate's Finding l(h) which states that the murder victim's vehicle was found near Petitioner's residence. The Court finds this particular fact inessential in making its determination. Even if the State's proof is accepted that the vehicle was found approximately equidistant from Cordova's and Villanueva's residence, this fact would not prove that Cordova was guilty of robbery. Abandonment of a vehicle by itself does not show intent to rob in a capital murder case. *Cf. Ibanez v. State*, ___ S.W. 2d ___ (Tex. Cr. App. 6/11/86) (unreleased decision at 8 of WESTLAW slip opinion). Third, Petitioner objects to Finding 1(l) that Cordova repeatedly struck Hernandez with a tire tool. While Cynthia West did not specifically testify how many times Cordova struck Hernandez with the tire tool, she did testify that Cordova was wielding the weapon and "going at him left and right." (Trial Record Volume IX at 2683). Furthermore, the medical examiner testified that Hernandez received at least five wounds which could have been caused by a blunt instrument such as the tire tool. (Trial Record Volume X at 2898-2904). Fourth, Petitioner objects to Magistrate's Finding l(m) and argues the evidence only proved one stab wound rather than repeated stabbings of the victim. Petitioner's argument simply misstates the trial record. The medical examiner testified that Hernandez

(footnote continued on next page)

that the evidence failed to establish that the murder victim was killed in the course of a robbery as alleged in the indictment.

Both parties agree that the United States Supreme Court decision in *Jackson v. Virginia*, 443 U.S. 307 (1979), *reh'g denied,* 444 U.S. 890, establishes the standard of review for the evidentiary sufficiency of a criminal conviction. *Jackson* requires that:

> ...The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. ...but this inquiry does not require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt... instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ...*Id* at 318-319.

Although the requirement that a defendant is convicted beyond a reasonable doubt is a matter of

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(footnote continued from previous page)
received one possibly fatal stab wound to the neck in addition to four other stab wounds. (Trial Record Volume X at 2904-5). Petitioner's next objection that no one saw any person take property from the victim is clearly frivolous. The other relevant factual objections made by Petitioner will be discussed in the body of the Court's opinion.

federal constitutional law under the due process clause of the Fourteenth Amendment, the *Jackson* standard must be applied with specific reference to the substantive elements of the criminal offense as defined by state law. *Id.* at 324 n. 16.

In this case, Petitioner was indicted and convicted for capital murder. Cordova's conviction of capital murder can only be upheld if the state has proven beyond a reasonable doubt that "the person [defendant] intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, or arson;" Tex. Penal Ann. §19.03(A)(2), (Vernon Supp. 1986). Accordingly, under *Jackson*, the question is whether a rational jury could have found beyond a reasonable doubt that the murder of Joey Hernandez was committed in the course of committing one of the enumerated felonies.

In this case, the underlying felony that petitioner was indicted and convicted of was robbery. Although the evidence may establish beyond a reasonable doubt that Cordova committed a rape, commission of this felony cannot support the capital murder conviction. An accused may only be constitutionally convicted of an offense charged in the indictment. *Cf. e.g., Francis v. Franklin,* 47 1 U.S. 307, 105 S.Ct. 1965, (1986); *Williams v. State*, 662 S.W.2d 344 (Tex. Crim. App. 1984). Likewise, the intent of petitioner's accomplice is immaterial unless it can be shown that petitioner joined in the intent to commit robbery. *Cf., Jones v. Thigpen*, 741 F.2d 805, 812 (5th Cir. 1984), *vacated* on other grounds, 106 S.Ct. 1172 (1986). (Accused, not his accomplice must have intent to kill in order to be sentenced to death constitutionally under the Eighth Amendment) (applying *Enmund v. Florida*,

458 U.S. 782 (1982)).[3] Under Texas law, a person commits robbery if "in the course of committing theft... and with intent to obtain or maintain control of the property, he: 1) intentionally, knowingly, or recklessly causes bodily injury to another; or 2) intentionally or knowingly threatens or places another in fear of imminent injury or death." Tex. Penal Code Ann. §29.02(A) (Vernon 1974). A person commits theft in Texas if he "unlawfully appropriates property with intent to deprive the owner of property." Tex. Penal Code Ann. §31.03(A) (Vernon Supp. 1987). A recent Texas court has broken down the offense of theft into six elements:

> To authorize a finding of theft in this case, the State was required to prove the following facts: 1) a person, namely the appellant, 2) exercised control over 3) tangible personal property ... 4) that was owned by or in the possession of the deceased 5) without the consent of the deceased, or with consent of the deceased that was induced by a threat to commit an offense, and 6) with the intent to withhold the [property] permanently from the deceased. *Cruz v. State,* 629 S.W.2d 852, 857 (Tex. Ct. App. 1982).

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[3]Although the Supreme Court's recent decision in *Cabana v. Bullock*, 106 S.Ct. 689 (1986), modified *Enmund* the modification concerned who must make the requisite finding of culpability and at what stage to satisfy the Eighth Amendment. The Eighth Amendment still requires a finding that the convicted defendant was individually culpable for the crime: "*Enmund*... imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death." *Id.* at 697. See also, *Jones v. Thigpen*, 788 F.2d 1101 (5th Cir. 1986). The *Enmund* standard was further modified most recently in *Tison v. Arizona*, 55 U.S.L.W. (April 21, 1987), discussed in Part F., *infra*.

Cruz was a capital murder case. The Court concluded that "murder and a subsequent theft do not constitute capital murder unless the violent conduct causing death was done with the intent to obtain or maintain control over the victim's property." Id. at 859. The murder must have occurred in order to facilitate the taking of property. *Ibanez v. State*, ___S.W.2d ___ (Tex. Crim. App., 1986) (unreleased opinion at p. 5 of slip). Furthermore, robbery as an afterthought and unrelated to a murder will not support a conviction for capital murder. *Ibanez, supra*; *O'Pry v v. State*, 642 S.W.2d 748, 762 (Tex. Crim. App. 1982); *Palafox v. State*, 608 S.W.2d 177 (Tex. Crim. App. 1979); *Cruz v. State,* 629 S.W.2d 852 (Tex. App.-Corpus Christi, 1982, p.d.r. ref'd).

The Court is now faced with the task of discerning petitioner's intent in committing this brutal crime. Petitioner did not testify at his trial, so there is no direct evidence of his intent. As in many criminal cases, the intent of the perpetrator must be determined by circumstantial evidence. The standard of review regarding the sufficiency of the evidence is the same whether direct or circumstantial evidence is at issue. *Holland v. United States*, 348 U.S. 121, (1954); *United States v. Garth,* 773 F. 2d 1469, 1477 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 2246 (1986); *U.S. v. Hilburn*, 625 F.2d 1177, 1180. Where the state appellate court reviewed the issue of sufficiency of evidence thoughtfully, that court's determination is entitled to "great weight". *Parker v. Procunier*, 763 F.2d 665, 666 (5th Cir. 1985), citing *Jackson v. Virginia, supra*, at 310, n. 15. After reviewing the evidence, the Court of Criminal Appeals concluded:

> The evidence shows that appellant and Villanueva simultaneously and jointly attacked Joey. Furthermore, when Cynthia West was forcefully removed from Joey's

> vehicle it was appellant that took control of Cynthia, and directed the actions of the others. The evidence is overwhelming that appellant acted as a dominant actor in this offense. ...In the instant case the jury could reasonably infer that appellant's initial encounter with Joey and West and his subsequent return, armed with weapons and in the company of three associates are circumstances from which one can reasonably infer a prior agreement or common purpose to commit the crime previously described. *Cordova v. State*, 698 S.W.2d at 112.

Similarly, the Magistrate's Findings of Fact were in line with the conclusion of the Court of Criminal Appeals. The Magistrate concluded:

> Petitioner took an active leadership role in carrying out the events leading to the attack on the vehicle's occupants. . .a juror could properly infer that petitioner and Villanueva planned in advance to rob the victim and Ms. West and to pool and divide the proceeds of the robbery. ...the killing of the victim was in furtherance of Petitioner's and Villanueva's common purpose to rob the victim. Petitioner's action encouraged, directed and aided Villanueva in the killing and robbery of the victim, and Petitioner's actions were done with the intent to promote and assist Villanueva in the commission of the killing and robbery. (Magistrate's Findings at 6.)

The Magistrate further concluded that "since robbery not only may be committed before, during or after the

murder to constitute capital murder, but may even fail in taking any property and since no other reasonable hypothetical motive for the killing had been shown, the evidence is sufficient to establish that Petitioner intentionally killed the victim during the course of attempting to commit or committing the robbery of the victim." *Id.* at 8.

After conducting a *de novo* review of the trial record, the supporting briefs of both sides, and the relevant case law, the court accepts the findings and recommendation of the Magistrate.

Petitioner contends that the State failed to show any relationship between the murder of Hernandez and the taking of his property or that the killing occurred to facilitate the taking of his property. While it is true there was no direct evidence to establish these facts, ample circumstantial evidence existed upon which a rational jury could convict beyond a reasonable doubt. The evidence demonstrated that Petitioner was the leader of the group and a reasonable jury could conclude that he formed the plan to rob Joey Hernandez. Furthermore, the proximity in time between the murder of Hernandez and the taking of his property[4] and the fact that the assailants were not previously acquainted with the murder victim, lends support to the jury's conclusion. In cases where courts found that the taking of property was an afterthought unrelated to the murder and therefore insufficient to support a capital murder conviction, other evidence existed to support another motive for taking the property. *See, e. q., Ibanez v. State, supra*, (defendant

[4]No evidence in the record establishes precisely when Joey Hernandez' property was taken. In any event, it is clear that the property was taken sometime after Hernandez was assaulted and before the assailants left the crime scene.

killed acquaintance in rage after homosexual liaison. Victim's car taken by defendant to flee scene but other valuable property left behind) ; *Cruz v. State*, 629 S. W. 2d 852 (Ct. App.-Corpus Christi, 1982) (defendant killed roommate and court accepted possibility of self defense). The facts here are closer to cases in which capital murder convictions were upheld. *See, e.g., Rector v. State*, ___ S.W. 2d ___, (Tex. Crim. App. Nov. 5, 1986) (unreleased opinion) (defendant surprised by rape/murder victim during burglary and then abducted victim and found near murder scene with murder weapon and property from victim's apartment); *O'Pry v. State*, 642 S.W.2d 748 (Tex. Crim. App. 1982) (defendant discovered in car with knife of victim after murder. Witnesses testified that defendant pawned weapons belonging to victim earlier in day and court disbelieved defendant's contention of a struggle and scared flight from murder scene). While these cases are of course distinguishable on the grounds that no property was ever discovered on Cordova's person after the killing, such a discovery is not a prerequisite to a robbery conviction.

Petitioner further contends that other hypotheses, inconsistent with capital murder, explain the crime and that the circumstantial evidence must exclude every other hypothesis except that of guilt. Specifically, Petitioner argues that: "[s]everal hypotheses appear from the face of the record, those being assault upon the victim for the purpose of raping Ms. West with Villanueva later killing the victim without Petitioner's knowledge to the other extreme of killing Hernandez for the purpose of raping and/or robbing West." It must be remembered, however, that the standard of review regarding sufficiency of the evidence is a question of federal rather than state law. *See Jackson, supra*, at 324 n. 16. Under federal law, circumstantial evidence need not exclude every

reasonable hypothesis but that of guilt to establish proof beyond a reasonable doubt. *Holland v. United States*, 348 U.S. 121, 140 (1954); *Stamper v. Baskerville*, 531 F.Supp. 1122, 1125 (E.D. Va. 1982) *rev'd on other grounds*, 724 F. 2d 1106 (4th Cir. 1984). In the Fifth Circuit, the standard of review does not require disproof of all reasonable hypotheses, as the Court noted in United States v. Del Aguila-Reves, 722 F.2d 155, 156-57 (1983):

> In Bell, we rejected our previous standard requiring the government's case, when based on circumstantial evidence, to be inconsistent with every reasonable hypothesis of innocence. Evidence is constitutionally sufficient when it enables a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. We therefore reverse convictions only when the evidence is so weak or so contrary to guilt that it would compel a jury to entertain a reasonable doubt of the defendant's guilt. (Footnotes omitted).

In this case, the evidence was not so weak that a jury would be compel led to entertain a reasonable doubt of Petitioner's intent to commit robbery. Other evidence in the record suggests that Cordova intended to rob Joey Hernandez. There is clear evidence that Cordova at least intended to rob Cynthia West. Before Petitioner raped Cynthia West, he robbed her of her watch and necklace. (Trial Record Volume IX at 2689). The watch was later recovered from Cordova's accomplice, Manuel Villanueva. In addition, while Cordova was leading Ms. West to the isolated area of the park where the rape occurred, he asked whether West's father had money to pay a kidnap ransom. (Trial Record Volume IX at 2684). Although, this evidence only establishes that Cordova had an intent to rob

Cynthia West, a reasonable jury could infer that during the entire criminal incident, Petitioner intended to rob both Hernandez and West. Furthermore, Cordova's guilt of robbery can be established under the law of parties when he is physically present at the offense and encourages the commission of the offense either by words or agreement. *Tarpley v. State*, 565 S.W.2d 525 (Tex. Crim. App. 1978). Both the Magistrate and the Texas Court of Criminal Appeals found that Cordova and Villanueva formed a prior agreement to rob Joey Hernandez. Magistrate's Finding 1(k) at 6; *Cordova v. State*, 698 S. W. 2d at 112. This conclusion of the highest state appellate court is entitled to "great weight" and this court chooses to follow it. *See Jackson v. Virginia, supra*, at 310 n. 15.

In reviewing a conviction for the sufficiency of the evidence, the reviewing court must not sit in place of the jury and ask itself whether it believes the evidence at trial established guilt beyond a reasonable doubt. *Id.* at 318-19. Due process only commands that the reviewing court decide whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* Under this test, the evidence in this case was clearly sufficient to convict Petitioner of capital murder. Accordingly, Petitioner's objections on this first major ground of error are REJECTED and the Magistrate's conclusion is ADOPTED.

B. LESSER INCLUDED OFFENSE OF MURDER

The Magistrate's Findings of Fact pertaining to Petitioner's second claim of error are unopposed and hereby ADOPTED by the Court. Petitioner does object to the Magistrate's Conclusions of Law. Petitioner was charged with the offense of capital murder pursuant to Section 19.03(A)(2) of the Texas Penal Code. Petitioner requested that an instruction on the lesser included

offense of murder be submitted to the jury. The trial court denied the request to instruct on the lesser included offense.

Murder is a lesser included offense of capital murder under Texas law. *Ex parte McClelland*, 588 S.W.2d 957 (Tex. Crim. App. 1979); Tex. Penal Code Ann. §19.03(C) (Vernon 1974).

In a federal habeas corpus action, the federal district court has no authority to review all misapplications of state law.[5] The federal court "may intervene only to correct wrongs of constitutional dimension." *Reddix v. Thigpen*, 805 F.2d 506, 511 (5th Cir. 1986), quoting *Smith v. Phillips*, 455 U.S. 209, 221 (1982). Under federal constitutional law[6] a lesser included offense instruction should be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973), *Reddix, supra,* at 512. Where one of the elements of the offense charged remains in doubt, but the defendant is guilty of some offense, a lesser

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[5]Large portions of the Magistrate's opinion and the Petitioner's objections focus on whether Texas law requires the lesser included offense instruction in this case. As the Fifth Circuit's recent opinion in *Reddix v. Thigpen*, *infra*, makes clear, a federal court need not address these issues. For the purposes of federal habeas review, the instructions given must only meet the minimum required by federal due process. *Id.*

[6]The standard under Texas law would appear similar if not identical. In *Aguilar v. State*, 682 S.W. 2d 556 Tex. Crim. App. 1985) the Court en banc adopted a two-prong test. The first prong requires that the lesser included offense must be included within the proof necessary to establish the offense charged. Secondly, there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense. *Id.* at 588, cited with approval in *Cordova*, 698 S.W. 2d at 113.

included offense instruction is required. *Beck v. Alabama*, 447 U.S. 625, 637, 100 S.Ct. 2382 (1980).

Particularly in a death penalty case, the reviewing court must carefully consider whether the trial court impermissibly gave the jury an all or nothing choice between conviction of a capital offense and acquittal. The *Beck* court held:

> . . . when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense--but leaves some doubt with respect to an element that would justify conviction of a capital offense--the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.... *Id*. at 637.

The Supreme Court further clarified the rationale behind the constitutional requirement of the lesser included offense instruction in *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154 (1984). In refusing to require a lesser included offense instruction when it was impossible for a jury to actually convict of the lesser included offense because of a statute of limitations defense, the *Spaziano* court interpreted *Beck* to require a lesser included offense instruction only where increased rationality would be introduced into the jury deliberation process:

> The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free. . . . The goal of the Beck rule, in other words, is to eliminate the

> distortion of the fact finding process that is created when the jury is forced into an all or nothing choice between capital murder and innocence. *Id.* at 3160.

Applying these constitutional standards, the Magistrate concluded: "The evidence did not put in question whether petitioner committed the aggravating factor of robbery. On the contrary, the evidence conclusively established that petitioner, acting jointly with others, intentionally or knowingly killed the deceased in the process of committing robbery. The record makes it abundantly clear that proof of the element of robbery was not put in issue to any degree." Magistrate's Findings at 11-12.

Petitioner objects to this conclusion on two essential grounds: 1) The state presented *no* evidence that George Cordova was guilty of capital murder; and 2) Requiring defendant to come forward to disprove the greater offense represents an unconstitutional shifting of the burden of proof and impermissibly penalizes defendant's exercise of his right to remain silent.

The first objection need not detain the court. As previously determined, there was ample evidence upon which a rational jury could find that Petitioner was guilty of robbing Joey Hernandez. Much of Petitioner's argument seems to depend on an overly narrow view of what constitutes evidence in a criminal case. While there was no direct evidence establishing that Cordova intended to rob Joey Hernandez and murder Hernandez in order to facilitate the taking of his property, the circumstances of the crime allowed the jury to infer this intent. In short, the State met its burden of proving the greater offense and a rational jury was entitled to convict George Cordova of capital murder.

Petitioner's second argument must also fail because it is founded on the erroneous premise of his first argument. Petitioner asserts that a judicial construction of the Texas capital murder statute required him to come forward with evidence to exculpate himself of the greater offense.[7] In no sense was Petitioner required to come forward and forfeit his right to remain silent. As the Magistrate aptly observed, a defendant is entitled to a lesser included offense instruction on issues raised by *all* of the evidence heard. Even if the accused chooses to exercise his right to remain silent and does not raise evidence rebutting the existence of the greater offense, he still may be entitled to a lesser included offense instruction. *See Lugo v. State*. 667 S. W.2d 144, 147 (Tex. Crim. App. 1984). Petitioner then points out that certain witnesses who might have proved his innocence of robbery could not be compelled to testify and Petitioner himself chose not to testify in reliance on his Fifth Amendment right. This argument proves far too much. By logical extension, a court should consider evidence which *might* have been presented as well as evidence which was actually presented in determining whether to give the lesser included offense instruction. Such a reading of the law would enable a defendant to force a lesser included offense instruction by simply invoking the right to remain silent or point to a co-defendant whose testimony could not be compelled.

Finally, Petitioner relies on *Mullaney v. Wilbur*, 421 U.S. 684 (1975), for the proposition that failure to

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[7]Petitioner cites the Texas Court of Criminal Appeals decision in this case in which the court stated: 'defendant did not testify nor did he offer any testimony which might reasonably raise any lesser included offenses." *Cordova v. State*, 698 S.W.2d 107, 113 (1985). This court does not endorse this language and also is not bound by the implied rationale behind the Court of Criminal Appeals decision.

give the requested instruction here unconstitutionally shifted the burden of proof. Petitioner claims the *Mullaney* case is "identical", but the court disagrees. In *Mullaney*, the Supreme Court overturned a Maine statute which required that *the defendant* prove he acted in the heat of passion in order to reduce a murder charge to manslaughter. In this case, the burden of proof never shifted. The State sustained its burden of proving robbery and the jury correctly determined, evaluating all of the evidence under *Lugo*, that Petitioner was guilty of capital murder. Under these circumstances, the defendant was not entitled to a lesser included offense instruction. The aggravating element of robbery did not "remain in doubt" under *Keeble* at the close of the evidence. Furthermore, a lesser included offense instruction was not required to eliminate distortion of the jury deliberation process under *Spaziano*. Accordingly, Petitioner's objection is REJECTED and the Magistrate's conclusion is ADOPTED.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner claims he was denied reasonable assistance of counsel because his lawyers failed to call alibi witnesses and reasonably investigate a possible alibi defense. This constitutional claim is of course governed by the recent Supreme Court case of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In order to get a conviction reversed on these grounds, the convicted defendant must satisfy a two part test:

> 1) The defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. 2) The

> defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction of death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Id.* at 2064.

The Strickland court went on to emphasize that "judicial scrutiny of counsel's performance must be highly deferential." Further, the court added that the reviewing court must indulge "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that the defendant must overcome the presumption that under the circumstances the challenged action might be considered sound trial strategy. *Id.* at 206 5-66. The allegation made by Petitioner here is particularly disfavored. As the Fifth Circuit recently held in *United States v. Cockrell,* 720 F.2d 1423, (5th Cir. 1983), *cert. denied,* 467 U.S. 1251 (1984):

> Complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative. (quoting *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir. 1978).

In this case, the Magistrate found that Cordova's trial counsel rejected the idea of presenting an alibi defense because, in their opinion, it relied on perjured testimony, and instead they adopted a strategy which focused on raising a reasonable doubt as to the State's

proof of the identification of petitioner. See Magistrate's Findings at 17. This Court finds that under the circumstances, this decision constituted a reasonable trial strategy.[8] Mr. Langlois and Mr. Logan believed that any introduction of the alibi testimony would constitute subornation of perjury. The rules of professional responsibility and the Sixth Amendment do not require that counsel do what is impossible or unethical. If there is no bonafide defense, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. See United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 2045 n. 19 (1984). In this case, trial counsel's opinion that such alibi testimony would be perjurious was clearly reasonable. The Magistrate found that Cordova's trial counsel received access to voluntary statements by Manuel Villanueva, and Rudy and Ruben Cordova, Petitioner's brothers, which all established that George Cordova was present in Espada Park at the time of the crime and that he repeatedly struck the victim with a tire tool while Villanueva stabbed the victim. Magistrate's Findings at 15. This finding of fact was unobjected to by Petitioner and it is hereby ADOPTED by the District Court. Other circumstances also

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[8]Petitioner argues that the failure to call witnesses exculpatory to the defendant cannot be deemed to be trial strategy since there can be no strategic or tactical benefit in withholding exculpatory evidence from a jury. Petitioner's reliance on *Ex parte Alaniz*, 583 S.W.2d 380 (Tex. Ct. Crim. App. 1979), is misplaced, however. In *Alaniz*, defendant's trial attorney failed to introduce an exculpatory letter from a co-defendant. The Court found that the attorney labored under a conflict of interest and his opinion that the letter could not be introduced was legally erroneous. *Id.* at 384-385. While trial counsel in *Alaniz* had no legal reason not to present the exculpatory evidence, Cordova's trial counsel had a substantial reason not to present the alibi defense. All attorneys labor under an independent ethical obligation which prohibits them from knowingly assisting unlawful conduct. *See* Model Code of Professional Responsibility DR 7-101(B).

supported the reasonableness of trial counsel's opinion that any alibi testimony would be perjurious. Some members of Petitioner's family informed defense counsel that they would testify to whatever counsel wished. Magistrate's Findings at 15. Further, George Cordova implicitly verified to counsel that he was present on the evening in question, but insisted that he neither struck the victim very hard nor robbed him. During the trial, petitioner again verified that he was present at the scene. Magistrate's Findings at 15. Petitioner objects to this finding on the ground that his statement to trial counsel did not constitute an admission of guilt. He now claims that the statements were made out of frustration and that they were said sarcastically. *See* Petitioner's Objections at 17. This after the fact explanation is not at all persuasive. First, petitioner gives no indication that his defense counsel understood that his statements were made out of frustration or sarcasm. Second, counsel were clearly reasonable in disbelieving Cordova's alibi in view of the independent corroborating evidence from Villanueva and Cordova's brothers. Third, the Magistrate found that Cordova's testimony was self-serving and not credible and this Court ADOPTS the Magistrate's position. Accordingly, the Court finds that Mr. Langlois and Mr. Logan declined to introduce alibi testimony because of their reasonable belief that such testimony was perjurious rather than their failure to provide effective assistance of counsel.

The Court need not reach petitioner's allegations that his trial counsel failed to fully investigate the alibi defense. In light of the findings that Logan and Langlois were reasonable in believing that such testimony was perjured, they did not have any duty to fully develop the alibi defense.

D. FAILURE TO DEFINE THE TERM "DELIBERATELY"

Petitioner contends that the trial court's refusal to issue a separate instruction on the definition of "deliberate" during the penalty phase of the trial constitutes a violation of the Eighth and Fourteenth Amendments of the Constitution requiring reversal of George Cordova's conviction. While Petitioner has crafted a clever argument, the Court chooses not to accept it.

After the Texas death penalty statute was overturned in *Branch v. Texas*, decided with *Furman v. Georgia*, 408 U.S. 238 (1972), the Texas legislature redrafted the statute to pass constitutional muster. The new capital sentencing procedure adopted requires the jury to affirmatively answer three questions before the death penalty may be imposed. If the jury fails to answer all three questions in the affirmative, a sentence of life is imposed. The questions the jury must answer are these:

1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

> Tex. Code Crim. Proc. art. 37.07 1 (Vernon's 1981).

Construction of the statute is a matter of Texas law. *Jurek v. Texas*, 428 U.S. 262, 272 at n. 7 (1976).

Petitioner maintains that the term deliberate, as used in the sentencing statute, is distinct from the term intentionally and requires a separate instruction. It is alleged that failure to instruct the jury on this distinction allows the jury to determine a mental culpable state without direction from the court. Petitioner concedes, as he must, that the Texas Court of Criminal Appeals has rejected requests for a separate instruction on several occasions. *See e.g., East v. State*, 702 S.W.2d 606 (1985), *cert. denied*, 106 S.Ct. 418; *Morin v. State*, 682 S.W.2d 265 (1985); *Penry v. State*, 691 S.W.2d 636 (1985), *cert. denied*, 106 S.Ct. 834 (1986); *Williams v. State*, 674 S.W.2d 315 (1984); *Russell v. State*, 665 S.W.2d 771 (1983), *cert. denied*, 465 U.S. 1073 (1984); *Hawkins v. State*, 660 S.W.2d 65 (1983). Defendant relies principally on Judge Clinton's dissenting opinion in *Russell v. State, supra*, for his argument that a separate instruction is required. Absent the separate instruction, Petitioner maintains that Cordova's conviction was capricious and arbitrary in violation of *Furman v. Georgia*.

Although Texas courts have acknowledged that the terms intentionally and deliberately are not synonymous, *see e.g., Williams*, 674 S.W.2d at 322 n. 6, Petitioner's claim does not rise to a level of constitutional magnitude. The constitution requires that any imposition of the death penalty be based on an individualized sentencing determination and not be done in a "wanton and freakish" manner. *See Jurek*, 428 U.S. at 271, citing *Woodson v. North Carolina*, 428 U.S. 280, 303-305 (1976); *Furman v. Georgia, supra; Williams v. State*, 674 S.W.2d at 321. The constitutionality of the

Texas sentencing procedure turns on whether the enumerated questions allow consideration of particularized mitigating factors. *Jurek*, 428 U.S. at 272.[9] Accordingly, if the trial court's failure to issue a separate instruction on deliberateness did not prevent the jury from considering evidence of mitigation, Cordova's sentence should be affirmed. In this case, petitioner cannot point to any evidence of mitigation which was improperly kept from the jury. Where known evidence in mitigation was barred by the trial court and proper consideration of mitigating circumstances was allowed, the sentence should be upheld. *See Williams v. State*, 674 S.W.2d at 320, 322. Petitioner's clever linguistic argument fails to show in any particular way how his constitutional rights were violated.

E. FOURTH AMENDMENT CLAIM

Petitioner now seeks relitigation of his Fourth Amendment tainted identification claim in federal court after the trial court denied his motion to suppress and Petitioner himself elected not to raise the issue on direct appeal to the Texas Court of Criminal Appeals. *See* Magistrate's Findings at 22. This claim is raised in the teeth of *Stone v. Powell*, 428 U.S. 465 (1976), which ordinarily bars relitigation of Fourth Amendment claims on habeas in federal court. In *Stone*, the Supreme Court specifically held that "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted habeas corpus relief on the ground that

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[9]Petitioner argues that *Jurek* is neither controlling nor persuasive because the *Jurek* court focused on the second jury issue of future dangerousness. While this reading of the thrust of the case is correct, the *Jurek* decision did illuminate the constitutional considerations involved in evaluating the Texas death sentencing statute.

evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494.

The question presented here is what constitutes a full and fair opportunity to litigate and whether Petitioner received this opportunity. The Magistrate incorrectly determined that the Texas Court of Criminal Appeals "addressed the issue on the state writ application." Petitioner's Fourth Amendment claim was fully addressed by the *trial* court on review of his state writ of habeas corpus, but the order entered by the Texas Court of Criminal Appeals affirming denial of the writ on July 16, 1986 is a short two page opinion which does not make any findings about the existence of probable cause to arrest Petitioner. *See Ex Parte George Cordova*, No. 16, 148-01 (Tex. Ct. Crim. App. 1986) (unpublished order of July 16, 1986). Although the Magistrate's factual finding was in error, this error does not affect the ultimate correctness of his recommendation to deny Petitioner relief.

Petitioner's claim for relief rests on the proposition that a full and fair opportunity to litigation under *Stone v. Powell* requires either full consideration or discussion by a state appellate court. Petitioner claims that his election not to litigate the issue on direct review to the Texas Court of Criminal Appeals does not constitute his full and fair opportunity under Stone.

The four cases relied on by Petitioner are readily distinguishable or supplanted by more recent Fifth Circuit authority. On its face, language from *Scott v. Maggio*, 695 F.2d 916 (5th Cir. 1983), *cert. denied*, 463 U.S. 1210, would seem to support Cordova's position. In *Scott*, the defendant presented his Fourth Amendment claim on post-conviction review to the Louisiana Supreme Court, but the Court denied his relief without discussion. In assuming that defendant

did not receive a full and fair opportunity to litigate under *Stone v. Powell*, the *Scott* court wrote:

> A situation might arise where a state court, perhaps through oversight or inadvertence, failed to consider fully the multiple claims of a habeas petitioner who has flooded it with various petitions.... there is nothing in the Louisiana Supreme Court's opinion and orders which indicate that Scott's Fourth Amendment claims were, though raised, considered by that court. ...But since these [claims] were not discussed, it can be fairly argued that Scott has not been presented with the full and fair opportunity of which *Stone v. Powell* speaks. In light of this, we assume, without deciding, that we are empowered by *Stone v. Powell* to pass on the merits of the Fourth Amendment claims raised by Scott's habeas petition. *Id.* at 920 (citations and footnote omitted).

The critical fact present in Cordova's case but missing in *Scott* is whether Scott elected not to present his Fourth Amendment claims on direct review. There is no indication in the *Scott* opinion that the defendant failed to present his claim on direct appeal. Application of the procedural default doctrine highlights the importance of this distinction. Under this doctrine, federal habeas review is barred where the petitioner fails to follow state procedural rules for bringing his claim. *See, e.g., Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U. S. 72 (1977). Under Texas law, Fourth Amendment claims not raised on direct appeal are deemed abandoned and will not be considered for the first time on collateral review. *Ex parte Kirby*, 492 S.W. 2d 579, 581 (Tex. Crim. App. 1973); see also, *Doescher v. Estelle*, 616 F. 2d 205 (5th

Cir. 1980). Petitioner's decision not to pursue his Fourth Amendment claim on direct appeal constituted an abandonment of that claim and he is now barred from bringing his claim collaterally to a federal court. Under Louisiana law, the court is not aware of any similar state procedural rule requiring assertion of Fourth Amendment claims on direct appeal to preserve the issues for collateral review.

In addition to this fundamental distinction between Texas and Louisiana law, the thrust of the Fifth Circuit's observation in *Scott* was directed at defining what constitutes adequate *consideration* by the court of a Fourth Amendment claim rather than defining what constitutes an *opportunity* for litigation. As this court interprets *Scott*, there are two components to the *Stone v. Powell* full and fair opportunity to litigate requirement. First, Petitioner must have an opportunity to present a claim. Second, as the *Scott* court assumed in dicta, Petitioner's claim must be adequately considered by the court. Even if this court accepts the *Scott* court's position that a Fourth Amendment claim must be discussed by the state appellate court,[10] this requirement would only apply once the habeas Petitioner properly raised his Fourth Amendment claim. In *Scott*, the Fourth Amendment claim was properly raised, 695 F.2d at 920, but in the present case Petitioner abandoned his Fourth Amendment claim by failing to raise it on direct appeal.

The three other cases relied on by Petitioner likewise do not require this court to reach the merits of

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[10]The *Scott* court noted that "[a] definitive ruling on this difficult point is unnecessary since we find no merit in the claims and the same result obtains whether or not we are empowered to review them by *Stone v. Powell*." *Id.* at n. 7.

the Fourth Amendment claim. In *O'Berry v. Wainwright*, 546 F.2d 1204 (5th Cir. 1977) *cert. denied*, 433 U.S. 711, the court held that a state appellate court must give full consideration to Fourth Amendment claims, but only when those claims had been "presented." *id.* at 1213. In this case, since Cordova did not present his Fourth Amendment claims on direct appeal, the requirement of full consideration urged by Petitioner was never triggered. The *O'Berry* court went on to observe that: . . . if Petitioner deliberately bypassed state procedures for making his fourth Amendment objections known or if he knowingly waived his Fourth Amendment objections, then a federal district court would be precluded from granting habeas corpus relief... despite the fact that no state hearing was in fact held on Petitioner's claims." *Id.* at 1213-14. This court now concludes that Cordova's failure to raise the Fourth Amendment claim on direct appeal to the Texas Court of Criminal Appeals was a knowing abandonment of the claim.

Since *Sosa v. United States*, 550 F.2d 244 (5th Cir. 1977), explicitly follows *O'Berry's* reasoning, it requires no separate discussion. The last case cited by Petitioner, *Smith v. Wainwright,* 581 F.2d 1149 (5th Cir. 1978), does not support his position. The *Smith* court did not interpret *O'Berry* to require a second appellate opportunity for litigation if the habeas petitioner failed to raise his Fourth Amendment claim for the first time on direct review:

> In *O'Berry*, this court held that *Stone's* 'full and fair opportunity to litigate' requirement is satisfied if the state affords a defendant an evidentiary hearing to determine the factual basis for his Fourth Amendment challenge and provides an opportunity for meaningful appellate review by a higher state court. ...*O'Berry*

> further noted that '*Stone* only requires that the State provide an opportunity for full and fair adjudication of Fourth Amendment claims'....*Caver v. State of Alabama*, 577 F. 2d 1188 (5th Cir. 1978). (citation omitted) *Id.* at 1151.

The *Caver* case is controlling here and prohibits this court from reexamining the merits of Cordova's Fourth Amendment claim. The identical argument now raised by Cordova was emphatically rejected by the Fifth Circuit in *Caver*:

> This circuit has interpreted 'full and fair consideration' of a fourth amendment claim to include at least one evidentiary hearing in a trial court and the availability of meaningful appellate review when there are facts in dispute, and full consideration by an appellate court when the facts are not in dispute. *O'Berry v. Wainwright*, 546 F. 2d 1204, 1213 (5th Cir. 1977) ; *see Sosa v. United States*, 550 F.2d 244, 249 & n. 4 (5th Cir. 1977).
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> Caver argues that *O'Berry* and *Sosa* hold that the bar of *Stone v. Powell* becomes operative only after there has been full and fair litigation in the state courts as these cases define. He contends that the mere presence of an opportunity unavailed of by a defendant, is not sufficient to preclude federal habeas corpus consideration of fourth amendment suppression claims. Under circumstances similar to those in this case, the Second Circuit rejected the argument advanced by Caver. *Gates v. Henderson*, 56 8 F.2d 830 (2d Cir. 1977) (en banc). We also reject his argu-

ment. An 'opportunity for full an fair litigation' means just that: an opportunity. If a state provides the processes whereby a defendant can obtain full and fair litigation of a fourth amendment claim, *Stone v. Powell* bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes.

Caver seizes on one sentence in the *Sosa* opinion which might appear to lend support to his position. That sentence, referring to *O'Berry* states:

> There, we held that the 'opportunity for full and fair consideration' must include at least one evidentiary hearing in a trial court and one decision by an appellate court which, if 'presented with an undisputed factual record, give full consideration to [the prisoner's] Fourth Amendment claims.
>
> . . .

However, *Sosa* was not addressing the issue whether *Stone v. Powell* requires actual litigation in the state courts but rather was attempting to paraphrase *O'Berry*. We deem *0'Berry* to be our guiding authority with respect to the meaning of the quoted sentence. The portion of *O'Berry* discussed in *Sosa* clearly was interpreting what a 'full and fair' consideration should consist of, not what an 'opportunity' would be. In fact, the paragraph in *0'Berry* immediately following the one quoted in footnote 4 of *Sosa* emphasizes that '*Stone* only requires that the

> State provide an *opportunity* for full and fair adjudication of Fourth Amendment claims.' *Id.* at 1191-92 (citation omitted)

As this passage from *Caver* makes clear, Cordova's election not to raise his Fourth Amendment claim on direct appeal constituted a full and fair opportunity to litigate under *Stone v. Powell*, and he is not entitled to a second opportunity to have this claim reviewed collaterally and Petitioner's Fourth Amendment claim is DENIED.

F. CRUEL AND UNUSUAL PUNISHMENT

Petitioner contends that imposition of the death penalty in his case violates the Eighth Amendment under *Enmund v. Florida*, 458 U.S. 782 (1983), because the evidence at trial did not establish that petitioner was individually culpable of conduct punishable by death. In order to be constitutionally convicted to death, the defendant must himself, "kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.* at 797. As previously determined in Part A of the opinion, there was ample evidence for the jury to determine that petitioner used lethal force and knew that his companion, Manuel Villanueva, was using a knife in a lethal manner. Accordingly, petitioner's sentence of death does not violate the prohibition against cruel and unusual punishment under the Eighth Amendment. *See also, Cabana v. Bullock,* 474 U.S. 376, 106 S.Ct. 689, 697 (1986). The Court ADOPTS the Magistrate's conclusion that any rational juror could have concluded beyond a reasonable doubt that petitioner by his actions intended to kill or contemplated that a life would be taken.

Since the filing of this habeas petition, the court has become aware of a recent United States Supreme

Court decision which modifies *Enmund*. On April 21st of this year, the Court decided *Tison v. Arizona*, 55 U.S.L.W. 4496, ___U.S.___, which authorized imposition of the death sentence to an accomplice in a felony-murder situation where the accomplice did not intend to kill or actually commit the killing. The *Tison* court held that: "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.* at 4502.

In *Tison*, the two brothers sentenced to die brought weapons to their father in prison (serving a life sentence for murder) and aided in the prison break-out. During their flight, the getaway car had a flat tire and the group decided to steal a car to continue the escape. One of the brothers flagged down a passing vehicle and the Good Samaritan family of four that stopped was kidnapped and driven to a remote desert area off the highway. While the elder Tison and his cellmate guarded the family at the disabled getaway vehicle, the two brothers walked back to the victims' car to fetch them water. Upon the brothers return, Gary Tison and his cellmate fired the fatal shot-gun blasts.[11]

George Cordova's participation in the killing of Joey Hernandez was far greater than that of Ricky or Raymond Tison. Cordova was physically present during the murder and delivered several blows with a potentially lethal weapon. *See ante* at p. 6 fn. 2. Cordova's conduct certainly evidenced a "reckless indifference to

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[11]The majority concluded that the Tison brothers were physically present while the fatal shots were fired, although the dissent points to evidence that the brothers were either at the victims' car or on their way back to the murder scene when the fatal shots were fired. *See* BRENNAN, J. (dissenting opinion) at 4504. In any event, this discrepancy is of no significance to this court's decision.

human life," and this court finds that Petitioner's death sentence does not violate the Eighth Amendment under either *Enmund* or the more relaxed standard announced in *Tison*.

G. CONCLUSION

The court has reviewed each objection Petitioner has raised to the Magistrate's recommendation and finds the objections without merit. It is therefore ORDERED that Petitioner's claims are DENIED and his habeas petition is DISMISSED with PREJUDICE.

Due to the importance of this case and the fact that Petitioner's counsel has notified the court of his intention to appeal this decision, it is FURTHER ORDERED that the stay of execution entered July 18, 1986, shall REMAIN IN EFFECT until Petitioner's thirty days time to file notice of appeal expires, *see* Fed. R. App. P. 4(a), or until the Fifth Circuit Court of Appeals assumes jurisdiction over this case.

SIGNED and ENTERED this, 21st day of May, 1987.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE